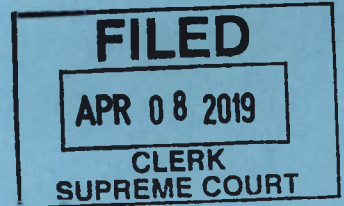


**SUPREME COURT OF KENTUCKY
CASE NO. 2018-SC-00523-DGE**



**ON APPEAL FROM:
KENTUCKY COURT OF APPEALS
CASE NO. 2018-CA-88-ME**

**KENTON CIRCUIT COURT
CASE NO. 17-AD-116**

**COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES, ET AL**

APPELLANT

V.

K.M.S., MOTHER

APPELLEE

BRIEF OF APPELLEE, K.M.S.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "George A. Thompson", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellee's Brief has been mailed USPS this 5th day of April, 2019 to the following: Hon. Dawn Gentry, Kenton Family Court, Fifth Division, 230 Madison Avenue, Covington, Kentucky 41011; Hon. Justin Durstock, Attorney for Father, 2216 Dixie Highway, Suite 202, Ft. Mitchell, KY 41017; Hon. J. Richard Scott, Guardian Ad Litem, 517 Madison Avenue, Covington, KY 41011; Hon. Abigail E. Voelker, Cabinet for Health and Family Services, 130 West 43rd Street, Covington, KY 41011, Hon. Sam Givens, Court of Appeals Clerk, 360 Democrat Drive, Frankfort, KY 40601. The undersigned also certifies that the record on appeal was not withdrawn by the Appellee.

A handwritten signature in blue ink, appearing to read "George A. Thompson", written over a horizontal line.

GEORGE A. THOMPSON

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not request oral arguments and believes the Court can adequately address the issues on appeal in reliance on the record and the briefs of the parties.

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COUNTERSTATEMENT OF THE CASE

The Cabinet for Health and Family Services "Cabinet" filed a Petition for Involuntary Termination of Parental Rights for the child A.W.S on June 16, 2017. *Kenton Circuit Record, Pages 1-7*. K.M.S. is the natural mother of the child A.W.S. A Trial was held in this matter on December 5th, 2017 in Kenton County Family Court. The Trial Court issued a Judgment Terminating Parental Rights. *Appellant's Appendix A-1, Judgment Terminating Parental Rights, Kenton Circuit Record, Pages 45-48*. The Trial Court further issued Findings of Fact and Conclusion of Law. *Id., Findings of Fact and Conclusion of Law, Kenton Circuit Record, Pages 36-44*.

During the trial in this matter the Cabinet first called Dr. James Rosenthal as a witness. *Video Record (V.R.), 12/5/17, 1:05 PM*. Dr. Rosenthal testified that he is a Licensed Psychologist and a Qualified Mental Health Professional. *Id.* Dr. Rosenthal testified that he prepared a report as it related to his interactions with the Mother. *V.R. at 1:06 PM; Cabinet's Exhibit #4, Kenton Circuit Record, Page 34*. Dr. Rosenthal met with the Mother on two occasions, 4/25/14 and 6/6/14. *Id.* The Mother was nineteen (19) years old at the time Dr. Rosenthal performed her evaluation. Dr. Rosenthal testified that the Mother advised him that she was being treated for Autism and Depression at that time. *V.R. at 1:09 PM*. Dr. Rosenthal testified that he reviewed the Mother's prior North Key medical records and the records indicated she was diagnosed with a Pervasive Developmental Disorder. *Id.* The Mother denied any substance abuse issues, nor did Dr. Rosenthal observe any signs of substance abuse. *V.R. at 1:10 PM, 1:19 PM*.

Dr. Rosenthal testified that he administered Wechsler Adult Intelligence Scale IV on the Mother. *V.R. at 1:10 PM*. Dr. Rosenthal testified the Mother scored a 70 on the

Verbal Comprehension Index, 67 on the Perceptual Reasoning Index, 69 on Working Memory Index, 79 on Processing Speed Index and a Full Scale IQ score of 65. *V.R. at 1:10 PM.* Dr. Rosenthal testified that an average score is a 100 with a standard deviation of 15, and that the Mother's score was on the borderline of mild mental retardation. *V.R. at 1:11 PM.*

Dr. Rosenthal testified that the Mother presented with deficits in her social judgment, age-appropriate social relationships, abstract reasoning and cognitive skills. *V.R. at 1:13 PM.* Dr. Rosenthal testified that he was concerned regarding neglect if the Mother was in a care taking role of a child. *V.R. at 1:14 PM.* Dr. Rosenthal testified that generally after fourteen (14) years of age intellectual abilities do not increase and he did not expect to see improvement from the Mother. *V.R., 1:16 PM – 1:17 PM.*

Dr. Rosenthal testified some individuals diagnosed with Autism could have difficulty taking an IQ test similar to the one he gave the Mother but that he did not see any signs from the Mother that would have compromised his test. *V.R. at 1:20 PM.*

Dr. Rosenthal testified that he believed the Mother would be capable of living by herself, in her own apartment, unsupported. *V.R., 1:24 PM-1:25 PM.* Dr. Rosenthal also testified that the Mother's intellectual level was sufficient enough to also work a part time job at approximately twenty (20) hours per week. *Id.*

The Cabinet then called Kevin Minch, Family Service Supervisor, with the Cabinet for Health and Family Services. *V.R. at 1:34 PM.* Minch testified that the minor child A.W.S. was born on 1/6/14. *V.R. at 1:35 PM.* Minch testified that A.W.S. came into the custody of the Cabinet on 1/13/14 and had remained with the Cabinet since that time. *Id.* Minch testified that shortly after the birth of A.W.S. the hospital expressed

concerns over Mother's ability to care for the child and the Mother did not have appropriate housing. *V.R., 1:39 PM – 1:41 PM.* Minch testified that A.W.S. was adjudged to be a Dependent child on 2/20/14. *V.R. at 1:41 PM.* Minch testified that the Mother has had continuous and ongoing visitation with the child since his birth. *V.R. at 1:43 PM.*

Minch testified that the Mother has completed her case plan with the Cabinet and has shown improvement in her parenting skills. *V.R. at 1:48 PM.* Minch testified that he still had concerns regarding the Mother's cognitive limitations and her ability to parent A.W.S. *Id.* Minch testified that Mother was currently employed and had recently obtaining independent housing. Minch testified that the Mother's housing is appropriate but he had concerns regarding stability because she was on a month to month lease. *V.R. at 1:49 PM.*

Minch testified the current visitation schedule between the Mother and child was bi-weekly and supervised at the Cabinet office. *Id.* Minch testified that the visits with the mother are consistent. *V.R. at 1:50 PM.* Minch testified that the Mother was having visits at the Mother's prior residence when she lived with her parents, but those visits were moved back to the Cabinet office because her residence had an issue with bed bugs. *V.R. at 1:51 PM.* Minch testified that visits are appropriate between the Mother and A.W.S. and visits have improved overtime. *V.R. at 1:52 PM.*

Minch testified that the child is attached to his foster parents as he has lived with them since shortly after his birth. *V.R. at 1:57 PM.* Minch testified that Mother did not have a criminal history or any concerns of substance abuse. *V.R. at 2:08 PM.* Minch

testified that he was unaware of any child support obligation owed by the Mother regarding A.W.S. *V.R. at 2:09 PM.*

Minch testified that A.W.S. had been in foster care for forty-six (46) months to the date of the hearing. *V.R., 2:09 PM – 2:14 PM.* Minch testified the mother had brought clothing and food during her visits with A.W.S. *Id.* Minch testified the Mother previously provided food for A.W.S. when the visits were at her residence. *V.R. at 2:11 PM.* Minch testified that Mother does attend medical appointments for A.W.S. *V.R. at 2:14 PM.*

Minch testified that he believed there were individual services that could benefit the Mother and her ability to parent. *V.R. at 2:23 PM.* Minch then testified that he believed the Cabinet had made reasonable efforts in attempt to reunify the parents with the child. *V.R. at 2:24 PM.*

Minch testified that A.W.S. is receiving services for developmental delays, including speech therapy and physical therapy. Minch testified that A.W.S. refers to his foster parents as mom and dad and that he has a strong emotional attachment with his foster parents. *V.R. at 2:27 PM.*

Minch testified that the Mother is very likeable, she has worked very well with the Cabinet, and without a doubt she loves and cares deeply about A.W.S. *V.R. at 2:30 PM.* Minch testified his concerns are regarding the Mother's ability to function at an appropriate level to care for a child, and that is no fault of her own. *Id.*

On Cross-examination Minch testified that A.W.S responds very well to the Mother and that the visits are improving. *V.R. at 2:34 PM.* Minch testified that the Mother has had continuous regular visitation with the child, at least once every other

week since the child was born. *Id.* Minch testified that the Mother has completed every task that the cabinet has asked her to complete on her case plan. *V.R. at 2:35 PM.*

Minch acknowledged that the Mother's case with the Cabinet suffered a period of inactivity on the Cabinets efforts to provide services from approximately January 2016 through January 2017. *V.R. at 2:36 PM.* Minch testified that unfortunately a lot of different caseworkers had the case that resulted in a lapse of progress. *Id.* Minch testified that the Mother's Autism Advocate, Maureen Simpson-Henson, became involved in the case in approximately January 2017. *V.R. at 2:37 PM.* Minch acknowledged that the Autism Advocate provided additional insight to possible other services that could be provided to the Mother. *V.R. at 2:37 PM.* Minch testified that until January 2017 no services were offered to the Mother relating to Autism or individuals with developmental delays. *V.R. at 2:38 PM.*

Minch testified in February 2017 the Cabinet developed a visitation schedule that included visits every weekend to gradually increase to overnight visitation. *V.R. at 2:39 PM.* Minch testified that in February 2017 the Cabinet recognized that there had been a period of stagnation with the case and that additional services were warranted to give Mother the opportunity to develop and improve her parenting skills. *V.R. at 2:40 PM.* Minch testified the issue with bed bugs at the Mother's residence prevented the overnight visitations from occurring. *Id.* Minch testified that in response to the bed bug issue the Mother obtained suitable independent housing. *V.R. at 2:42 PM.*

Minch testified that the Mother's interactions with the child and the Mother's understanding of parenting skills have improved. *V.R. at 2:43 PM.* Minch testified that when the Mother was presented with tools to improve her parenting skills she utilized

those tools and improved her parenting skills. *Id.* Minch testified that he believed there are possible services that could improve the Mother's parenting skills, but that he did not believe that the improvement could be done in a reasonable amount of time. *V.R. at 2:44 PM.*

Minch testified that upon his re-examination of the case it was apparent that services specific to the Mother's developmental issues and diagnoses were not explored at the time the case originated. *V.R. at 2:45 PM.*

The Mother then called Maureen Simpson-Henson to testify on her behalf. Maureen Simpson-Henson testified that she is a licensed Speech Pathologist. *V.R. at 3:06 PM.* Simpson-Henson testified that she has known and worked with the Mother as a former student regarding speech and language therapy. *Id.* Simpson-Henson testified that the Mother has speech delays and Autism and that she was on the initial team of experts that diagnosed the Mother with Autism. *V.R. at 3:08 PM.* Simpson-Henson testified that she became re-involved with the Mother in approximately January 2017. *Id.*

Simpson-Henson testified that she then advised the Cabinet of additional services that could assist the Mother. *V.R. at 3:18 PM.* Simpson-Henson testified that she has observed improvements to the Mother and believed that she has the ability to continue to improve in her parenting skills. *V.R. at 3:25 PM.* Simpson-Henson testified that the Mother has improved greatly with her independence skills since she gave birth to A.W.S. *V.R. at 3:35 PM.*

The Kentucky Court of Appeals reversed and remanded the matter on the basis that there was insufficient evidence to show the child was neglected. *Appellant's Appendix A-2, Court of Appeals Opinion 2018-CA-88.*

ARGUMENT

I. THE KENTUCKY COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CABINET FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT A.W.S. WAS A NEGLECTED CHILD.

The Mother contends that the Court of Appeals Opinion Vacating and Remanding was proper in this matter. The Mother contends that the Court Appeals was correct in the holding that the Commonwealth failed to show by clear and convincing evidence that A.W.S. was an "abused or neglected child" as required by KRS 600.020(1).

Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child must have been found to be an "abused or neglected" child, as defined by KRS 600.020. *KRS 625.090(1)(a)*. Second, termination must be in the child's best interest. *KRS 625.090(1)(b)*. Third, the family court must find at least one ground of parental unfitness. *KRS 625.090(2)*. *B.E.K. v. Cabinet for Health and Family Services*, 487 S.W.3d 457, 464 (Ky. App. 2016).

The first requirement necessary to terminate a parent's rights is set forth in KRS 625.090(1)(a). It provides that the Trial Court must find at least one of the following three requirements to be present by clear and convincing evidence:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely if the parental rights are not terminated.

Only subsection two (2) is applicable to this appeal as the prior finding towards the child that resulted in the custody removal was a Dependency finding. *V.R. at 1:41 PM.*

Under KRS 600.020(1) an "abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the

child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months; or

(b) A person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age.

The Mother continually cooperated with the Cabinet during the duration of her case and complete her case plan towards reunification with the child. The Mother continued to show progress and was even in a position to start overnight visitation with the child until circumstances out of her control (bed bugs in apartment) in March of 2017. *V.R. at 1:51 PM.*

The Mother continued to bring clothing and food to her visits with the child even though she is on social security disability with limited finances. The Mother did not have a child support order obligation, therefore was not in failure to pay child support. The Mother contends that she is now capable of providing care for the child and has been refused the opportunity to do so by the Cabinet.

By the Cabinet's own admission during the Trial in this matter there were additional services that could be offered to the Mother to assist her ability to parent A.W.S. *V.R. at 2:23 PM.* Furthermore, the Mother's reunification case plan suffered a period of stagnation on the part of the Cabinet due to a turnover in case workers. *V.R. at 2:36 PM.* The Cabinet also acknowledged that at the onset of the Mother's case that the Cabinet failed to offer the Mother services specific to her developmental issues that could have assisted her ability parent her child. *V.R. at 2:45 PM.* The Cabinet acknowledged there are additional services that could be offered, but did not believe those could be accomplished in a timely manner. *Id.*

The Kentucky Court of Appeals has held that, “The risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm.” *K.H. v. Cabinet for Health & Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011).

Therefore, the Mother contends that the Trial Court’s determination that A.W.S. was a neglected child pursuant to KRS 600.020(1) was clearly erroneously. The Cabinet failed to prove the necessary elements required under the definition of a neglected child by clear and convincing evidence. The Cabinet’s assertion that the Mother suffers from such a cognitive delay that she would pose an imminent danger to her child is simply without support from the record.

The Cabinet argues that the Court of Appeals inaccurately held that one must have an opportunity to parent the child, therefore eliminating risk of harm as a basis for abuse or neglect. The Mother contends that this argument is misplaced. The Court of Appeals Opinion regarding the Mother not having the ability to parent the child is very fact specific to this case. The reason for such is partially a result of the Cabinet’s improper handling of the case.

The Court of Appeals Opinion addressed this issue, “Moreover, Cabinet’s rationale to support the Mother’s ostensible neglect is somewhat disingenuous. The reason Child has been in foster care for the last four years is because the Cabinet removed Child from Mother’s custody based on its perception that Mother was unable to care for him. There is no culpability of the Mother’s part.” *Appellant’s Appendix 1-2, Court of Appeals Opinion 2018-CA-88, Pg. 10.*

The Cabinet’s argument that the Court of Appeals focused on “Intent” of the mother and created a new element of “Intent” to find a child neglected is also misplaced.

Again, the holding in this matter is very fact specific to this case, and here the Mother did everything that was asked of her from the Cabinet and was deprived of the opportunity to parent her child.

The Court of Appeals held, “We do not believe it has been established that Mother intended to neglect the child. Instead, the facts of this matter implicate dependency, which is different than neglect. While dependency may occur in circumstances similar to neglect, it lacks the requisite intent on the part of the parent.” *Appellant’s Appendix 1-2, Court of Appeals Opinion 2018-CA-88, Pg. 9.*

Further examination of *KRS 600.020(20)* provides the definition of “dependent” child:

“Dependent child” means any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child.”

Our courts have long held that a child cannot be both neglected and dependent. *J.H. v. Commonwealth, Cabinet for Human Resources*, 767 S.W.2d 330, 332 (Ky. App. 1988). *Id.*

“A child who suffers harm as a result of a parent’s intentional acts is neglected or abused. In contrast, a child is dependent if the harm results from a parent’s unintentional acts, or from a cause unrelated to parental culpability.” L. GRAHAM & J. KELLER, 15 KY. PRACTICE SERIES, DOMESTIC RELATIONS LAW § 6:9 (2017). *Id.*

The Kentucky Court of Appeals has held that, our court system holds parental relationships in the highest esteem, and has found them deserving of the highest protection. Our nation’s highest court has held that “the rights to conceive and to raise one’s children are essential, basic civil rights of man, and rights far more precious ...

than property rights.” *H.M.R. v. Cabinet for Health and Family Services*, 521 S.W.3d 221, 227 (Ky. App. 2017) citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

“In order to protect the rights of natural parents, Kentucky courts require strict compliance with statutory provisions governing the involuntary termination of parental rights.” *P.C.C. v. C.M.C., Jr.*, 297 S.W.3d 590, 592 (Ky. App. 2009) (citing *Day v. Day*, 937 S.W.3d 717 (Ky. 1997)). KRS 625.090.

It is evident that the Court of Appeals determined that the factual basis of the case did not support a finding of “Neglect” that such facts supported a finding of “Dependency” as defined by *KRS 600.020(20)*. “Dependency” by definition is an unintentional act, the Court of Appeals correctly held that the Cabinet failed to prove some element of intent as it relates to the Mother neglecting her child.

The Court of Appeals agreed that an interpretation of “threatened with harm” as defined under 600.020(1) could implicate a neglect finding in some cases. Appellant’s *Appendix 1-2, Court of Appeals Opinion 2018-CA-88, Pg. 13*. The Court of Appeals specifically indicated that the facts did not rise to that level in the case. *Id.* The Court of Appeals held, “Mother, here, has developmental disabilities. But that alone is insufficient to render her behavior as neglectful.” *Id.*

The Mother contends that the decision on whether the Court of Appeals unlawfully created a new element of “Intent” in termination of parental rights actions and whether the Cabinet failed to show by clear and convincing evidence that A.W.S was a “Neglected” child are not one in the same. The Mother contends that the Cabinet failed to show by clear and convincing evidence that A.W.S. was a “Neglected” child.

II. THE KENTUCKY COURT OF APPEALS DID NOT ERRONEOUSLY APPLY A DE NOVO STANDARD OF REVIEW.

Appellate review is “confined to the clearly erroneous standard in CR7 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *W.A. v. Cabinet for Health & Family Services*, 275 S.W.3d 214, 220 (Ky. App. 2008). (quoting *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38-39 (Ky. App. 1998)). “Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

A Trial Court’s order is clearly erroneous if it is unsupported by sufficient evidence on the record. *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986).

The Court of Appeals Opinion specifically indicates such standard, “We hold the termination of parental rights was improper because insufficient evidence supported the determination that the child was “neglected” by Mother”. *Appellant’s Appendix A-2, Court of Appeals Opinion 2018-CA-88, Pg. 13*. The Court of Appeals did not simply substitute their own judgement of the evidence in place of the Trial Court’s judgment. The Court of Appeals cited to ample facts in the record to support their holding.

Therefore, the Mother contends that such assertion that the Court of Appeals erroneously applied the wrong standard of review is unsupported in the record. Furthermore, as previously stated the Cabinet failed to show A.W.S. was a “Neglected” child, as such there was not sufficient evidence in the record to support such a finding.

III. THE REMAINING ELEMENTS OF KRS 625.090 WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Although the Kentucky Court of Appeals did not address the remaining requirements pursuant to KRS 625.090 the Mother contends that the Commonwealth also failed to prove such elements by clear and convincing evidence.

The Mother contends that the Trial Court was clearly erroneous in determining that it was in the best interest of A.W.S. to Terminate the Parental Rights of the Mother. Under KRS 625.090(3), the Trial Court must consider whether termination is in the best interests of the child. The Trial Court has very broad discretion when making this determination. *B.E.K. v. Cabinet for Health and Family Services*, 487 S.W.3d 457 (Ky. App. 2016) citing *W.A. v. Cabinet for Health and Family Services*, 275 S.W.3d 214 (Ky. App. 2008). In determining the best interests of a child, KRS 625.090(3) requires the Trial Court to consider several factors which include the following:

- (a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
- (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
- (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
- (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
- (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

The Mother contends that it is not in the best interest of A.W.S to terminate her parental rights. The Mother contends that she does not have any intellectual disability that renders her consistently unable to care for immediate and ongoing physical and psychological needs of the child for extended periods of time. The Mother contends that assessment by Dr. Rosenthal was flawed and outdated. The examination was given in 2014 shortly after her giving birth at the age of nineteen (19) years old. The Mother by the acknowledgement of the Cabinet has improved greatly since that time period. The Mother has completed all task on her case plan, obtained independent housing, gained employment and has improved her parenting skills.

The Mother further testified that she is in the process of obtaining her G.E.D. The Cabinet has testified that although the child is bonded to the foster parents that the child reacts well to the Mother. The Mother has been consistent in visiting with the child since removed from her care. Minch testified that the child responded well to the Mother and that the visits have continued to improve. *V.R., 1:48 PM – 1:55 PM.*

The Cabinet acknowledged that at the onset of the case the Cabinet failed to offer the Mother any services as it relates to individuals with developmental delays. *V.R., 2:30 PM. – 2:45 PM.* The Cabinet acknowledged that the Mother's case was stagnate for a period of time because of turnover in workers which led to a lack of services being offered to the Mother. *Id.* The Cabinet acknowledged that the Mother was fully cooperative with all services offered to her. *Id.*

The Cabinet's position to terminate Mother's parental rights is based solely on the theory that the Mother would never be able to effectively parent this child. Mother's

position is that the Cabinet failed to provide her the opportunity to effectively parent her child. Minch testified that the Mother is very likeable, she has worked very well with the Cabinet, and without doubt she loves and cares deeply about the A.W.S. *V.R. at 2:30 PM.*

The Cabinet simply offered testimony from Minch that the child was attached to his foster parents and called them mom and dad. *V.R. at 1:57 PM.* Minch also testified that the visits with the Mother have been consistent and are positive. *V.R. at 1:50 PM.* Minch further testified that the Mother would bring food and clothing during her visits and that he is unaware of any child support obligations of the Mother. *V.R. at 2:11 PM.*

Therefore, the Mother contends that the Trial Court's determination that it was in the child's best interest to Terminate the Mother's Parental Rights was clearly erroneously. The Cabinet failed to prove the necessary elements required under the KRS 625.090(3) by clear and convincing evidence.

KRS 625.090(2) provides that at least one or more of the various grounds listed in KRS 625.090(2)(a-j) must also be proven by clear and convincing evidence before a termination of parental rights may be ordered. The grounds listed in the statute are:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable

expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

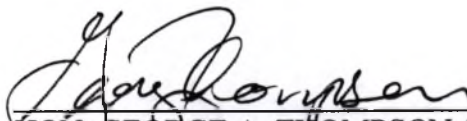
(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

The Mother concedes that the child has been in in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights pursuant to section 625.090(2)(j). The Mother contends that for reasons previously stated that the Cabinet failed prove by clear and convincing evidence that she committed the acts in sections (e) and (g) of KRS 625.090(2) as indicated in the Trial Court's Judgment Terminating Parental Rights. *Appellant's Appendix A-1, Circuit Record, Pages 45- 48.*

CONCLUSION

For the reasons stated herein, Mother contends that the Trial Court's Judgment Terminating Parental Rights was clearly erroneous as there was insufficient evidence presented by the Cabinet at Trial with respect to the requirements of KRS 625.090(1)(a), KRS 625.090(1)(b), KRS625.090(2), and KRS625.090(3) to support such a Judgment. Wherefore, Mother respectfully prays that this Court to affirm the Kentucky Court of Appeals Opinion Vacating and Remanding.

Respectfully submitted,



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